

# Antitrust Litigation: What's Changed in Twenty-Five Years?

BY WILLIAM KOLASKY

**I**N 1986, WHEN THE ABA SECTION of Antitrust Law launched its new magazine, ANTITRUST, the future of antitrust litigation looked bleak. In a series of decisions beginning with *Brunswick* and *GTE Sylvania* in 1977, the Supreme Court had embraced the so-called Chicago School view that antitrust should be concerned exclusively with economic efficiency, making it substantially more difficult for plaintiffs to win antitrust cases. In addition, during the Reagan Administration there had been a steady decline in the level of government enforcement. As a result, the volume of new private antitrust filings had declined over the past decade from a record 1600 in 1977 to less than 600 in 1987. This decline led one prominent antitrust litigator, Stephen Susman, to declare that these changes had “destroyed the practice that existed ten years ago” and to say that he and other members of the antitrust plaintiffs’ bar had “survived only by shifting to other areas of practice.”<sup>1</sup>

As with Mark Twain, these reports of the impending death of antitrust litigation were premature. Over the next twenty years, from 1988 to 2008, private antitrust litigation experienced a resurgence, recapturing most of the ground it had lost in the preceding decade. But the nature of this litigation is now very different from what it was in the 1970s. Terminated dealer and Robinson-Patman cases are largely relics of the past. Instead, today most private antitrust filings are class actions filed by customers seeking to recover damages for illegal cartel activity, usually as a follow-on to government enforcement actions. Individual actions are still common, but the courts now have much better tools for weeding out meritless claims earlier in the litigation so that those cases that make it to trial have a better chance of success.

Following the Supreme Court’s 2007 decision in *Bell Atlantic v. Twombly*,<sup>2</sup> there has been another falloff in the volume of new antitrust case filings. It is too early to tell whether this is the beginning of a long-term trend, forecasting a new decline in antitrust litigation that may cause members of the antitrust plaintiffs’ bar again to begin shifting to other areas

of practice. But whether it is or not, there is no question but that the world of antitrust litigation is very different today than it was when ANTITRUST first began publishing a quarter-century ago. This article will look back on the changes that have taken place over this period.

## A Statistical Overview of Antitrust Litigation

We begin with some numbers. Figure 1 below graphs the number of private antitrust claims filed in federal district court each year from 1950 to 2011.<sup>3</sup>

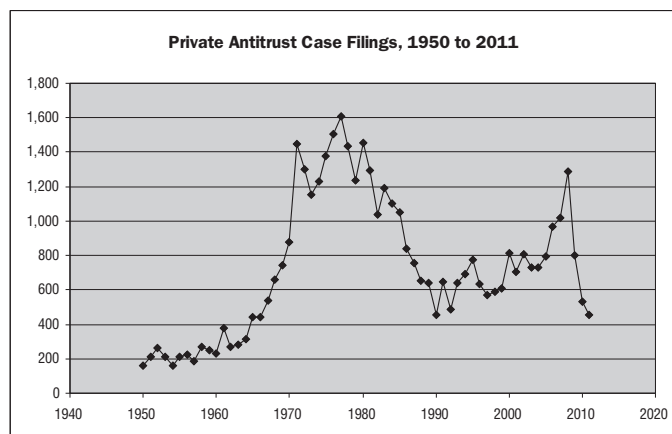


Figure 1

As Figure 1 shows, the number of private antitrust actions peaked in 1977 following a fourfold increase in private antitrust case filings over the preceding decade. This explosion was fueled by Supreme Court decisions that had expanded the per se doctrine well beyond naked horizontal price-fixing conspiracies to a wide variety of other horizontal and vertical restraints and had made it easier to prove a large firm liable for anticompetitive conduct under either the Sherman Act or the Robinson-Patman Act.<sup>4</sup>

In 1977, the Supreme Court began shifting direction. In several decisions that year, most notably *GTE Sylvania* and *Brunswick*,<sup>5</sup> the Court began to embrace “new learning” among antitrust scholars who argued that the antitrust laws were intended to protect competition in order to promote economic efficiency and consumer welfare, not to shield

smaller producers from larger, more efficient rivals.<sup>6</sup> In other words, as the Court declared in *Brunswick*, the purpose of the antitrust laws is “the protection of competition, not competitors.”<sup>7</sup> In *GTE Sylvania*, the Court reinforced the shift by overruling its decision in *Schwinn*<sup>8</sup> just one decade earlier, which had declared vertical territorial restraints per se unlawful, emphasizing that antitrust law was concerned with protecting interbrand, not intrabrand, competition. The effect of these decisions and their progeny was dramatic. In just ten years, from 1977 to 1987, the number of private antitrust case filings gave up all of the gains of the preceding decade, dropping back to where it had been in 1967 before *Schwinn* was decided.

Figure 1 shows that this downward trend ended in 1990. Starting in 1991, and continuing over the next eighteen years until 2008, the number of antitrust case filings increased steadily until by 2008 they were almost back to their 1980 level. Over the last three years, however, the number of filings has again dropped sharply, so that in 2011 the number of new cases was at its lowest level since 1990.

The increase in private antitrust litigation during the period from 1991 to 2008 may seem somewhat surprising given the hostility the Supreme Court has shown toward private antitrust plaintiffs over this period, ruling against them in fifteen straight cases from 1993 to 2009. The most likely explanation was stepped-up government enforcement activity, especially in the cartel area. As we discuss below, the Department of Justice introduced its amnesty program in 1993, which led to the discovery and prosecution of a large number of multinational cartels. During the Clinton Administration, the Department of Justice and the Federal Trade Commission also had very active civil enforcement programs, initiating a number of significant monopolization cases, most notably the *Microsoft* case. While civil enforcement at the Department of Justice dropped off significantly during the George W. Bush administration, the Department continued an active cartel enforcement program, uncovering some of the largest cartels in history; and the Federal Trade Commission continued to have an active civil enforcement program.

The reason for the sudden reversal in the trajectory of private antitrust litigation in 2009 is less clear, especially since it coincided with the election of a president who had vowed to “reinvigorate antitrust enforcement.”<sup>9</sup> One possible explanation is that it may be a reaction to the long string of pro-defendant decisions in the Supreme Court, culminating in the Court’s 2007 decisions in *Leegin* and *Bell Atlantic v. Twombly*.<sup>10</sup> In *Leegin*, the Court overruled the century-old per se rule against resale price maintenance. Even more significantly, in *Twombly*, the Court “retired” the liberal pleading standard enunciated a half-century earlier in *Conley v. Gibson*,<sup>11</sup> under which a complaint could not be dismissed for failure to state a claim unless there was “no set of facts” that would entitle the plaintiff to recover. It replaced that old standard with a new standard that required a plaintiff instead to plead sufficient facts to state a “plausible” claim for relief.

Some have offered an alternative explanation, suggesting that the falloff in private antitrust litigation over the last three years may be a result of the 2008 financial crisis and the ensuing recession, which may have made companies less willing to spend money on litigation.<sup>12</sup> To test this second hypothesis, Figure 2 examines the number of private actions filed in federal district court asserting claims under federal law generally for each year from 1950 to 2011.<sup>13</sup> It shows that whereas the number of antitrust case filings peaked in 1977, the number of federal claims overall continued to increase until 1997. Over the next five years, 1997 to 2002, while antitrust filings increased, the number of federal claims fell somewhat, and over the last decade has been essentially flat, despite some year-to-year fluctuations. The 2008 financial crisis and the ensuing recession does not appear to have caused a decline in the volume of federal claims generally, so it is hard to see why it would have caused a decline in private antitrust litigation.

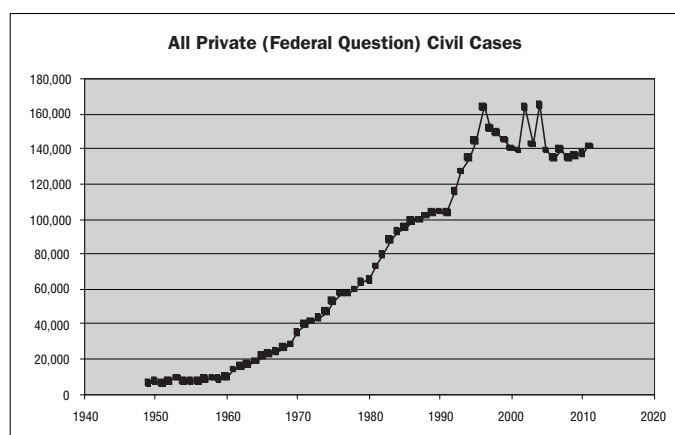


Figure 2

We turn now from the total volume of private antitrust litigation to the makeup of the suits that are filed. In an article in the Summer 2010 issue of *ANTITRUST*, Donald Hawthorne surveyed recent trends in federal antitrust class actions based on a study of federal antitrust class action cases filed between January 1, 2007 and December 31, 2009.<sup>14</sup> During this period, there were 1,811 federal antitrust class actions filed, which he reduced to 121 distinct cases. Over this same three-year period, a total of 3,168 private antitrust actions were filed, so these class actions represent roughly three-fifths of the total number of private actions filed. Hawthorne found that, of the 121 distinct cases he studied, nearly 60 percent arose from a prior government enforcement action, domestic or foreign, most of which involved alleged cartel activity. Not surprisingly, therefore, 80 percent of the cases asserted Section 1 claims, whereas only 27 percent asserted Section 2 claims, either alone or in combination with Section 1 claims. Only one in four cases asserted vertical claims, most frequently bundling or tying, and generally alongside Section 2 claims.

Unfortunately, we are unaware of any similar comprehensive study of trends in individual antitrust claims filed during this period. However, Gregory Wrobel, Michael Waters, and Joshua Dunn, for an article in the Fall 2011 issue of ANTITRUST, compiled a database of all motions to dismiss that were decided during the period between the Supreme Court's decision in *Twombly* and the publication of the article.<sup>15</sup> Very few of these actions—unlike the class actions filed during the same period—were follow-on cases to government enforcement actions. And, while there were only a handful of government actions filed during this period challenging single-firm conduct under either Section 2 of the Sherman Act or Section 5 of the FTC Act, Section 2 claims constituted roughly 44 percent of the individual private claims that were the subject of motions to dismiss during this period.

### Changes in Substantive Antitrust Doctrine

Many of the changes in antitrust litigation over the last twenty-five years have been driven by changes in substantive antitrust law. Some of these changes were already well underway when ANTITRUST launched in 1986. Over the preceding decade, the Supreme Court had, for example, through its decisions in *GTE Sylvania*, *Broadcast Music*,<sup>16</sup> and *Northwest Wholesale Stationers*,<sup>17</sup> already moved decisively toward narrowing the scope of the per se doctrine, forcing antitrust plaintiffs to prove their claims under a more demanding effects-based rule of reason standard. Despite Mr. Susman's pessimism, other Supreme Court decisions had, up to that point, been more encouraging to antitrust plaintiffs. For example, the Court in *NCAA v. Board of Regents*<sup>18</sup> and *Indiana Federation of Dentists*<sup>19</sup> had introduced the notion of a "quick-look" rule of reason analysis in which a plaintiff could prevail on a Section 1 claim without a detailed examination of the structure of the affected markets. And in *Aspen Highlands*,<sup>20</sup> the Court had ruled for the plaintiff in a monopolization case, holding that a monopolist could be liable under Section 2 for refusing to assist a smaller competitor without having a legitimate business reason for its refusal. In fact, overall, in the decade prior to the launch of ANTITRUST magazine, plaintiffs won nearly one-half of the antitrust cases decided by the Supreme Court.<sup>21</sup>

The Supreme Court has been far less friendly to antitrust plaintiffs over the last twenty years. Following its 1992 decision in favor of the plaintiff in *Eastman Kodak*<sup>22</sup> until its 2010 decision in *American Needle*,<sup>23</sup> the Court decided every single private antitrust case to come before it in favor of the defendant. Through these decisions, the Supreme Court would seem to have made it much more difficult for a private antitrust plaintiff to prevail in terms of substantive antitrust law. This article is not the place to detail the changes in substantive antitrust law the Court has made over this period, so we will only highlight a few of the most important:

■ In *Brooke Group*,<sup>24</sup> the Court held that, in order to recover for predatory pricing, a plaintiff must show that the

alleged monopolist had both priced below some appropriate measure of cost and had a reasonable prospect of recouping its resulting losses;

- In *State Oil v. Khan* and *Leegin*,<sup>25</sup> the Court overruled the long-standing per se rules against both maximum and minimum resale price maintenance; and
- In *Trinko*,<sup>26</sup> the Court declined to endorse the essential facilities doctrine and limited *Aspen Highlands* to situations where the alleged monopolist had refused to supply its rival something it was selling to the public generally at the same price the rival was willing to pay.

### From *Matsushita* to *Twombly*: Lowering the Bar to Summary Disposition

Aside from these changes in substantive antitrust law, another important development affecting private antitrust litigation over the last twenty-five years has been the increased willingness of courts to dispose of meritless antitrust claims through motions to dismiss and motions for summary judgment. When ANTITRUST first published in 1986, the Supreme Court had just decided *Matsushita Electric Industrial Co. v. Zenith Radio Corp.*<sup>27</sup> That case, which the magazine featured in two articles in its inaugural volume,<sup>28</sup> marked a watershed in the history of antitrust litigation. Prior to *Matsushita*, summary judgment—to say nothing of motions to dismiss—was generally disfavored in complex litigation, and especially in antitrust cases. Indeed, to defeat a motion for summary judgment in an antitrust case, a plaintiff often needed to do little more than parrot the Supreme Court's edict in *Poller v. CBS*: "Summary procedures should be used sparingly in complex antitrust litigation . . . Trial by affidavit is no substitute for trial by jury."<sup>29</sup>

Ignoring its own advice, the Supreme Court in *Matsushita* reversed a denial of summary judgment and showed a new willingness to weigh the proffered facts to determine whether the plaintiffs' claims made economic sense. The plaintiffs had alleged a conspiracy among Japanese television manufacturers to engage in predatory pricing to gain a monopoly over the U.S. television market. The Court found it implausible that a group of competitors would have deliberately incurred substantial losses over a twenty-year period, at the end of which they still had only a 40 percent share of the U.S. market, in hopes of recouping those losses by charging monopoly prices at some point in the future. The Court held, therefore, that the plaintiffs needed "more persuasive evidence" than they were able to proffer to create a genuine issue of fact as to the existence of such a conspiracy.

In 2007, the Supreme Court extended *Matsushita*'s implausibility standard to motions to dismiss in *Bell Atlantic Corp. v. Twombly*.<sup>30</sup> *Twombly* involved an alleged conspiracy among the four incumbent local exchange carriers to suppress competition in their local markets both by refusing to comply with their obligations under the Telecommunications Act of 1996 to open up their facilities to competing local exchange carriers and by agreeing not to invade each other's

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local markets. The Second Circuit had reversed a dismissal of the complaint, relying on language from the Supreme Court's 1957 decision in *Conley v. Gibson* to the effect that "a complaint should not be dismissed for failure to state a claim unless it appears beyond doubt that the plaintiff can prove no set of facts in support of his claim that would entitle him to relief."<sup>31</sup> The Supreme Court reversed. Declaring that the *Conley v. Gibson* "no set of facts" standard had been "questioned, criticized, and explained away long enough" and had therefore "earned its retirement,"<sup>32</sup> the Court held that to survive a motion to dismiss a complaint's "factual allegations must be enough to raise a right to relief above the speculative level,"<sup>33</sup> and that this requires that it allege "enough facts to state a claim for relief that is plausible on its face."<sup>34</sup>

The Court found that the complaint in *Twombly* did not meet this new "plausibility" standard because it alleged no facts beyond the defendants' parallel conduct to show any agreement among them. Their parallel conduct alone was not sufficient to infer a conspiracy, the Court held, because there was an equally plausible alternative explanation for that parallel conduct—namely, that it was a "natural" result of the defendants' "common perceptions" of their unilateral business interests.<sup>35</sup> The Supreme Court clarified and reinforced the *Twombly* decision in *Ashcroft v. Iqbal*, explaining that a "claim has facial plausibility when the plaintiff pleads factual content that allows the court to draw the reasonable inference that the defendant is liable for the misconduct alleged," and reiterating that, "[w]hile legal conclusions can provide the framework of a complaint, they must be supported by factual allegations."<sup>36</sup>

ANTITRUST again immediately recognized the importance of what the Court had done. An article in the Fall 2007 issue predicted that *Twombly*'s new plausibility standard "would have real teeth" and would be applied not just to the conspiracy element of antitrust claims, but to other elements as well.<sup>37</sup> In an article in the Fall 2011 issue, Greg Wrobel, Michael Waters, and Joshua Dunn confirmed this prediction.<sup>38</sup> They examined a database of 378 courts of appeals and district court rulings on motions to dismiss in antitrust cases from the time *Twombly* was decided in 2007 until the date of their article in 2011. They found that the courts had dismissed one or more antitrust claims in 74 percent of these decisions. In these cases, the courts applied *Twombly* and *Iqbal* to nearly every element of an antitrust claim, including standing, antitrust injury, market power, anticompetitive conduct, and anticompetitive effect.

### **Daubert: Barring Junk Science from the Courtroom**

Another change over the last twenty-five years that has given the courts greater power to dispose of meritless antitrust claims was the Supreme Court's 1993 decision in *Daubert v. Merrell Dow Pharmaceuticals, Inc.*,<sup>39</sup> which clarified the standards for the admissibility of expert testimony. In *Daubert*, the Court held that the trial court's "gatekeeping" function gives it the responsibility to "ensure that any and all scientific testimony or evidence admitted is not only relevant, but reliable."<sup>40</sup> The Court went on to outline the standards a trial judge should apply in determining whether expert testimony is reliable. These include: (1) whether the theory or technique can be or has been tested; (2) "whether the theory or technique has been subjected to peer review and publication"; (3) "the known or potential rate of errors . . . and the existence and maintenance of standards controlling the technique's operation"; and (4) "whether the theory or technique has been generally accepted."<sup>41</sup>

Six years later, in its 1999 decision in *Kumho Tire Co. v. Carmichael*,<sup>42</sup> the Court extended *Daubert* to non-scientific expert testimony based on other "technical" or "specialized" knowledge, which most lower courts had already done. In 2000, Federal Rule of Evidence 702 was amended to conform to *Daubert* by providing that expert testimony is admissible only "if (1) the testimony is based upon sufficient facts or data, (2) the testimony is the product of reliable principles and methods, and (3) the witness has applied the principles and methods reliably to the facts of the case."<sup>43</sup>

ANTITRUST has published multiple articles on *Daubert*.<sup>44</sup> In the most recent, James Langenfeld and Christopher Alexander examined 97 *Daubert* challenges in antitrust cases over the period from 2000 to 2011.<sup>45</sup> They found that almost 85 percent of these challenges were directed at the plaintiffs' experts. They also found that defendants in these cases had a remarkably high success rate: 40 percent of the experts whose testimony was challenged had their opinions fully or partially excluded.

Because expert economic testimony is critical to most antitrust disputes, the admissibility of that testimony under *Daubert* has become a key battleground in many antitrust trials. A good example is *Concord Boat Corp. v. Brunswick Corp.*<sup>46</sup> A number of boat builders brought an antitrust action against stern drive engine manufacturer Brunswick alleging that Brunswick, which had a 75 percent market share, was attempting to maintain its monopoly by offering substantial discounts to builders who purchased a large share of their engines from Brunswick. The plaintiffs presented expert testimony from Dr. Robert Hall, a well-respected professor of economics at Stanford, to show that Brunswick could not have maintained its large market share but for its allegedly anticompetitive conduct. The trial judge denied Brunswick's motion to exclude Dr. Hall's testimony, ruling that the jury could draw its own conclusion from his testimony. The jury did so, finding Brunswick liable and awarding plaintiffs \$44 million in damages before trebling. On appeal, the Eighth

Circuit reversed, holding that the trial judge had failed to exercise his gatekeeper function and that Dr. Hall's testimony should have been excluded because his testimony was based on a model "which was not grounded in the economic reality of the stern drive engine market."

This term, the Supreme Court will decide whether *Daubert* should be extended to expert testimony offered in support of class certification. In *Comcast Corp. v. Behrend*,<sup>47</sup> the Court granted certiorari to determine "[w]hether a district court may certify a class action without resolving whether the plaintiff class has introduced admissible evidence, including expert testimony, to show that the case is susceptible to awarding damages on a class-wide basis." This is an issue on which the courts of appeals are currently split, with several circuits declining to apply *Daubert* to exclude expert testimony at the class certification stage, holding instead that the trial judge can hear the testimony but then decide how much weight to give it.<sup>48</sup>

#### **From Eisen to Dukes: Bringing Rigor to Class Certification**

As class actions have become a more important part of the private antitrust litigation landscape, the standards for certifying a class have likewise become more important. As the Federal Advisory Committee on Rules of Civil Procedure has recognized, the ruling on certification will often decide the fate of any class action. An order granting certification will often "force a defendant to settle rather than incur the cost of defending a class action and run the risk of potentially ruinous liability."<sup>49</sup> Conversely, a denial of class certification will often cause the plaintiffs to abandon their individual claims because the amounts they can recover individually will not justify the cost of litigation.

Having recognized the critical importance of the class certification decision, the Advisory Committee in 1997 adopted Rule 27(f), giving the courts of appeals discretion to hear appeals from the grant or denial of class certification.<sup>50</sup> This seemingly modest change in Rule 23, combined with some further procedural changes to Rule 23 in 2003, has had the result of radically transforming the class certification process.<sup>51</sup> Prior to the 1997 amendments, the general view, as expressed by the Supreme Court itself, was that the prerequisites for class certification could be "readily met in certain cases alleging . . . violations of the antitrust laws."<sup>52</sup> Today, this is no longer the case.

Although the Supreme Court had previously instructed district courts that a class should be certified only "if the trial court is satisfied, after a rigorous analysis, that the prerequisites of Rule 23 are met,"<sup>53</sup> many district judges in 1997 were still conducting little more than a cursory review, relying in part on the Court's caution in *Eisen v. Carlisle & Jacquelin* that Rule 23 does not "give[] a court authority to conduct a preliminary inquiry into the merits."<sup>54</sup> This language had led district judges to derive three corollaries that constrained the scope of the inquiry they could undertake to

determine whether the requirements of Rule 23 were met:

- The first corollary was that "a court must accept as true the factual allegations contained in the complaint";
- The second was that a court should "not delve into the merits of plaintiffs' substantive claims in ruling on such a motion"; and
- The third corollary was that a court should not be drawn into a "battle of the experts" because only the trier of fact should determine what weight to give to the experts' conclusions.

Armed with the power given them by Rule 23(f), virtually every circuit has now rejected all three of these corollaries and, in so doing, has injected much greater rigor into the class certification process.<sup>55</sup> Available data suggests that the number of class certification denials has increased dramatically. For example, between 1998 and 2005, the courts of appeals evaluated 68 denials of class certification, and 78 grants of class certification.<sup>56</sup> From 2003 through 2009, the numbers flipped; only 59 grants of class certification reached the courts of appeals, while 98 denials were the subject of appellate review.<sup>57</sup> Significantly, the courts of appeals affirmed more denials than grants during both periods, with the ratio favoring grants increasing in the more recent period.<sup>58</sup>

This shift began with the Seventh Circuit in two of the earliest decisions under Rule 23(f), *Szabo v. Bridgeport Machines, Inc.*<sup>59</sup> and *West v. Prudential Securities, Inc.*,<sup>60</sup> both written by Judge Frank Easterbrook. In *Szabo*, the court held that a district judge need not accept the allegations in the complaint as true for purposes of class certification because, unlike a motion to dismiss which tests only the legal sufficiency of a complaint, the decision on class certification requires a factual inquiry into whether the requirements of Rule 23 are met. In *West*, the court rejected the notion that a judge, in ruling on class certification, should avoid issues that overlap with the merits of the claim and should not seek to resolve conflicts between the testimony of the two sides' respective experts. Instead, Judge Easterbrook insisted, "Tough questions must be faced and squarely decided, if necessary by holding evidentiary hearings and choosing between competing perspectives."<sup>61</sup>

Over the ensuing decade, most other circuits adopted Judge Easterbrook's reasoning and followed his lead in holding that a rigorous analysis of whether Rule 23's prerequisites are met requires looking beyond the allegations in the complaint, examining the merits of the case to the extent necessary to determine whether they are suitable for class adjudication, and evaluating the testimony of the two sides' experts.<sup>62</sup> A notable example of this trend was the Third Circuit 2009 decision in *In re Hydrogen Peroxide Antitrust Litigation*,<sup>63</sup> reversing a district court's grant of class certification. In its decision, the Third Circuit held, as the Seventh Circuit had, that the decision to certify a class requires findings by the court that each requirement of Rule 23 is met and that those findings must be supported by a preponderance of the evidence. The Third Circuit also held that in deciding

whether to certify a class, a court “must resolve all factual or legal issues relevant to class certification, even if they overlap with the merits.”<sup>64</sup> And, finally, the Third Circuit held that this obligation “extends to expert testimony, whether offered by a party seeking class certification or by a party opposing it.”<sup>65</sup>

To the extent there was still any split among the circuits on these issues, that split was resolved by the Supreme Court in 2011 in its decision in *Wal-Mart Stores, Inc. v. Dukes*.<sup>66</sup> There, in reversing a grant of class certification in a massive employment discrimination case, the Supreme Court agreed with those circuits, like the Seventh and Third, which had held that Rule 23 “does not set forth a mere pleading standard,” and that a party seeking class certification “must affirmatively demonstrate his compliance with the rule—that is, he must be prepared to prove that there are *in fact* sufficiently numerous parties, common questions of fact, etc.”<sup>67</sup> The Court acknowledged that the rigorous analysis required by Rule 23 “will entail some overlap with the merits of the plaintiffs’ claim,” but it held that this “cannot be helped” because “the class determination generally involves considerations that are enmeshed in the factual and legal issues comprising the plaintiffs’ cause of action.”<sup>68</sup> The Court, therefore, disavowed its earlier language in *Eisen*, which it said had “sometimes [been] mistakenly cited to the contrary.”<sup>69</sup>

### The Justice Department Amnesty Program

While the changes we have discussed so far would seem to have made it more difficult to bring and win an antitrust case, other developments over the last twenty-five years have had the opposite effect, and have stimulated more private antitrust litigation. The most important of these are the changes in the Justice Department’s leniency program, beginning in 1993, which have markedly improved the government’s ability to detect, investigate, and prosecute hard-core antitrust crimes, such as price fixing, bid rigging, and market allocation.

The first key improvement was to offer a bigger carrot to encourage companies to blow the whistle on themselves and their co-conspirators. The Justice Department has had a corporate leniency program since 1978, but prior to 1993 that program was rarely used, yielding on average only about one leniency application per year.<sup>70</sup> In August 1993, the Antitrust Division revised its Corporate Leniency Program to make it easier and more attractive for companies to come forward.

Under the revised program: (1) full amnesty became automatic for qualifying companies if there was no pre-existing investigation; (2) leniency was still available even after an investigation was commenced if the company was the first one to offer to cooperate with the investigation; and (3) all officers, directors, and employees who come forward with the company were also protected from prosecution.<sup>71</sup> Since 1993, the Department has made further improvements in the program by, among other things, creating an amnesty-plus program under which a company that does not obtain amnesty

with respect to one cartel may still be able to obtain amnesty for other cartels in which it participated and thereby also earn a reduced sentence for the first cartel.<sup>72</sup>

The second key improvement was to create a bigger stick by ratcheting up the penalties imposed on cartel members who do not come forward or who refuse to cooperate with the ensuing investigation. Over the last twenty-five years, sanctions imposed in cartel cases brought by the Justice Department have increased exponentially.<sup>73</sup> In FY 1991, the average corporate fine for an antitrust offense in the United States was a little less than \$320,000, and the largest corporate fine ever imposed was \$2 million. Today, corporate fines in the hundreds of millions of dollars have become commonplace, with the Department obtaining over \$1 billion in fines in FY 2009 alone. The Department has also substantially increased the sanctions for individuals who participate in a cartel. The Department now insists that foreign, as well as U.S., executives who plead guilty agree to serve jail time in a U.S. prison. To assist in this effort, Congress increased the maximum sentence for antitrust crimes to ten years in 2004, and the average jail sentence for all convicted antitrust felons is now close to three years.

Since making these two sets of related changes, Justice has seen a twenty-fold increase in the leniency application rate.<sup>74</sup> As a result, since FY 1996, the government has collected more than \$5 billion in fines, with over 90 percent of this amount tied to investigations assisted by leniency applicants. The success of the U.S. leniency program has prompted other jurisdictions and agencies to adopt similar programs across the globe.<sup>75</sup>

The success of the Department’s criminal enforcement program has played an important role in revitalizing private antitrust litigation. As we have already seen, from 1990 to 2008, there was a threefold increase in the volume of private antitrust litigation. Most of this increase can be attributed to the success of the Justice Department’s leniency program, with one study finding that nearly 60 percent of all private antitrust class actions filed from 2007 to 2010 were a follow-on to government enforcement actions.<sup>76</sup> Robert Lande and Joshua Davis studied 40 private antitrust actions that reached resolution between 1990 and 2008, most of which were follow-on cases to government enforcement actions.<sup>77</sup> They found that the plaintiffs in these cases recovered more than \$18 billion, or an average of more than \$1 billion each year, just from publicly-reported judgments and settlements. The full amount recovered would be much larger if information were available on privately-negotiated settlements with plaintiffs who opted out of the class actions.

### The Growth of e-Discovery

When ANTITRUST began publishing in 1986, many, if not most, antitrust lawyers did not yet have computers on their desks, much less access to e-mail, and the World Wide Web would not even be developed for another three years. Another major change that has affected antitrust litigation over the

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past quarter century has been the shift of American business from paper to electronic files, and especially the now nearly universal use of e-mail for both intra- and intercompany communications. A 2009 study found that American businesses now exchange 2.5 trillion e-mails each year, with employees of a typical company exchanging two million e-mails annually.<sup>78</sup> The explosive growth of e-mails and other electronic files has created a whole new form of discovery and a whole new industry: e-discovery.

As ANTITRUST has reported, e-discovery has affected antitrust litigation in multiple ways.<sup>79</sup> One of the most important has been to give both government enforcers and antitrust plaintiffs a treasure trove of potentially incriminating evidence. While business executives long ago learned to be cautious about what they put in writing in the form of a memorandum or letter, it has taken them much longer to realize that what they say in an e-mail can be equally or more incriminating, and just as easily discovered. The importance of e-mail in helping a plaintiff win an antitrust case is nowhere better illustrated than in the government's monopolization case against Microsoft, in which e-mails threatening "to cut off Netscape's air supply" featured prominently in both the district court and court of appeals opinions finding Microsoft liable for monopolizing the market for personal computer operating systems.<sup>80</sup>

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E-discovery has since become a critical part of every antitrust case. And with the explosion of the volume of electronic files, e-discovery has been one of the main reasons antitrust litigation has become increasingly expensive, both for plaintiffs and defendants. In one large multidistrict antitrust litigation, it was reported that the plaintiffs reviewed over 60 million pages of documents produced by the defendants—a fact they used to support an application for over \$10.25 million in fees.<sup>81</sup> And in the FTC's investigation into alleged exclusionary practices by Intel, it was reported that Intel produced over 200 million pages of mostly electronic documents.<sup>82</sup> It is no surprise, then, that discovery costs now account for 50 percent of litigation costs in a typical federal case.<sup>83</sup>

The growth of e-discovery has also changed the way law firms practice law. Whereas in 1987, it was still common for firms to have large teams of highly paid associates and paralegals poring through hundreds of boxes of hard-copy documents, most document review is now being outsourced to lower-priced contract lawyers and e-discovery vendors. It has been reported that the revenues of e-discovery vendors grew

from \$40 million in 1999 to an estimated \$4.6 billion in 2010.<sup>84</sup>

Until recently, the shift to e-discovery has greatly increased the cost of antitrust litigation, increasing the incentive for defendants to settle if a case moved beyond the motion to dismiss stage. There is now hope, however, that there may be a technological solution to a problem technology created. Increasingly sophisticated software is becoming available that allows the document review process to be more fully automated, with machines doing much of the initial document review work that has been done by lawyers and paralegals in the past. As more courts come to accept the use of these "predictive coding" algorithms to review documents, as some already have,<sup>85</sup> there is hope that the cost of e-discovery will begin to come down.

### **Arbitration**

Until shortly before ANTITRUST launched in 1986, it was thought to be well settled that antitrust claims were not subject to arbitration because of "the pervasive public interest in enforcement of the antitrust laws."<sup>86</sup> This view began to erode in 1985 when the Supreme Court held, in *Mitsubishi Motors Corp. v. Soler Chrysler-Plymouth*, that international antitrust disputes could be referred to arbitration panels, citing "concerns of international comity, respect for the capacities of foreign and transnational tribunals, and sensitivity to the need of the international commercial system for predictability in the resolution of disputes" as the reasons for its decision.<sup>87</sup> Two years later, in *Shearson/American Express*, the Court ruled that domestic RICO claims were arbitrable, citing *Mitsubishi* for the proposition that "arbitral tribunals are readily capable of handling the factual and legal complexities of antitrust claims, notwithstanding the absence of judicial instruction and supervision."<sup>88</sup> This decision opened the door to arbitration of purely domestic antitrust claims as well,<sup>89</sup> although there continued to be uncertainty as to whether claims arising from a horizontal price-fixing conspiracy could be subject to arbitration. This uncertainty was resolved by the Second Circuit in its 2004 decision in *JLM Industries v. Stolt-Nielsen, S.A.*, which held that such claims were subject to arbitration.<sup>90</sup>

As arbitration of antitrust claims has become more common, courts have had to confront the issue of whether such claims can be pursued in arbitration on a class basis. In *Stolt-Nielsen, S.A. v. Animalfeeds International*, a case involving allegations of price fixing in the maritime industry, the Supreme Court held that an arbitration agreement that was silent on the availability of class arbitration could not be interpreted to permit it.<sup>91</sup> One year later, in a non-antitrust case, *AT&T Mobility v. Concepcion*, the Supreme Court overturned a California state court ruling that a class action waiver provision in an arbitration agreement was "unconscionable and unenforceable," finding that the plaintiffs had failed to show that they could not secure effective relief through individual actions.<sup>92</sup> The Court left open the possibility, howev-

er, that in more complex types of litigation, such as antitrust cases, a class action waiver might be unenforceable. Accepting this invitation, the Second Circuit refused to enforce a class action waiver in an antitrust case brought by cardholders against American Express and other card issuers alleging a conspiracy to fix fees on foreign currency exchanges.<sup>93</sup> It remains to be seen how widely this decision will open the door to class arbitration in other antitrust cases.<sup>94</sup>

## Retrospective

While he was a Deputy Assistant Attorney General in the Antitrust Division, David Meyer gave a speech reviewing the Supreme Court's antitrust decisions over the last quarter century, and concluded that those decisions meant "not less antitrust, but better antitrust."<sup>95</sup> As this article has shown, Mr. Meyer may well be right. Contrary to the fears of the plaintiffs' bar in 1987, antitrust litigation has thrived over the past quarter-century. And with courts now having much better tools to weed out meritless claims earlier in the litigation, meritless claims should now impose less of a burden on American business, while the victims of serious antitrust offenses should still be able to recover for their damages. ■

<sup>1</sup> Stephen D. Susman, *Business Judgment vs. Antitrust Justice*, 76 GEO. L.J. 337 (1987).

<sup>2</sup> Bell Atl., Inc. v. Twombly, 550 U.S. 544 (2007).

<sup>3</sup> Figure 1 is based on data reported in *Judicial Business of the United States Courts, Annual Report of the Director*, various issues, published by the Administrative Office of the U.S. Courts, available at <http://www.uscourts.gov/Statistics/JudicialBusiness.aspx>. See Paul E. Godek, *Does the Tail Wag the Dog?: Sixty Years of Government and Private Antitrust in the Federal Courts*, ANTITRUST SOURCE, Dec. 2009, [http://www.americanbar.org/content/dam/aba/publishing/antitrust\\_source/Dec09\\_Godek12\\_17f.auth.checkdam.pdf](http://www.americanbar.org/content/dam/aba/publishing/antitrust_source/Dec09_Godek12_17f.auth.checkdam.pdf).

<sup>4</sup> See, e.g., *United States v. Arnold, Schwinn & Co.*, 388 U.S. 365 (1967) (holding vertical territorial distribution restraints per se unlawful); *Utah Pie Co. v. Cont'l Baking Co.*, 386 U.S. 685 (1967) (finding above-cost local price discounts unlawful under the Robinson-Patman Act).

<sup>5</sup> *Cont'l T.V., Inc. v. GTE Sylvania Inc.*, 433 U.S. 36 (1977); *Brunswick Corp. v. Pueblo Bowl-O-Mat*, 429 U.S. 477 (1977).

<sup>6</sup> The Court's other two key decisions that year were *Illinois Brick Co. v. Illinois*, 431 U.S. 720 (1977) (holding that indirect purchasers do not have standing to sue for damages), and *U.S. Steel Corp. v. Fortner Enterprises*, 429 U.S. 610 (1977) (holding that U.S. Steel did not possess sufficient "leverage" in the credit market to foreclose competition in the prefabricated housing market).

<sup>7</sup> *Brunswick*, 429 U.S. at 488 (quoting *Brown Shoe Co. v. United States*, 370 U.S. 294, 320 (1962)).

<sup>8</sup> *Arnold, Schwinn & Co.*, 388 U.S. 365.

<sup>9</sup> Barack Obama, Statement for the American Antitrust Institute (Sept. 27, 2007), available at [http://www.antitrustinstitute.org/files/aai-%20Presidential%20campaign%20-%20Obama%2009-07\\_092720071759.pdf](http://www.antitrustinstitute.org/files/aai-%20Presidential%20campaign%20-%20Obama%2009-07_092720071759.pdf).

<sup>10</sup> *Leegin Creative Leather Prods., Inc. v. PSKS, Inc.*, 551 U.S. 877 (2007); *Bell Atl., Inc. v. Twombly*, 550 U.S. 544 (2007).

<sup>11</sup> 355 U.S. 41 (1957).

<sup>12</sup> See Andrew E. Abere, *Private Antitrust Cases Decrease Again in 2010—Filings Are at Their Lowest Level Since 1992*, PRINCETON ECONOMICS GROUP,

INC. (2012), available at [http://www.econgroup.com/peg\\_news\\_view.asp?newid=44&latest=true](http://www.econgroup.com/peg_news_view.asp?newid=44&latest=true).

<sup>13</sup> Figure 2 is based on data reported in *Judicial Business of the United States Courts, Annual Report of the Director*, various issues, published by the Administrative Office of the U.S. Courts, available at <http://www.uscourts.gov/Statistics/JudicialBusiness.aspx>.

<sup>14</sup> Donald W. Hawthorne, *Recent Trends in Federal Antitrust Class Actions*, ANTITRUST, Summer 2010, at 58.

<sup>15</sup> Gregory G. Wrobel, Michael J. Waters & Joshua Dunn, *Judicial Applications of the Twombly/Iqbal Plausibility Standard in Antitrust Cases*, ANTITRUST, Fall 2011, at 8.

<sup>16</sup> *Broadcast Music, Inc. v. CBS*, 441 U.S. 1 (1979).

<sup>17</sup> *Nw. Wholesale Stationers v. Pac. Stationery & Printing Co.*, 472 U.S. 284 (1985).

<sup>18</sup> *NCAA v. Bd. of Regents*, 468 U.S. 85 (1984).

<sup>19</sup> *FTC v. Ind. Fed'n of Dentists*, 476 U.S. 447 (1986).

<sup>20</sup> *Aspen Skiing Co. v. Aspen Highlands Skiing Corp.*, 472 U.S. 585 (1985).

<sup>21</sup> Of 32 antitrust cases decided by the Supreme Court between 1977 and 1987, plaintiffs won 14.

<sup>22</sup> *Eastman Kodak Co. v. Image Technical Servs.*, 504 U.S. 451 (1992).

<sup>23</sup> *Am. Needle, Inc. v. NFL*, 130 S. Ct. 2201 (2010).

<sup>24</sup> *Brooke Grp. v. Brown & Williamson Tobacco Corp.*, 509 U.S. 209 (1993).

<sup>25</sup> *State Oil Co. v. Khan*, 522 U.S. 3 (1997); *Leegin Creative Leather Prods., Inc. v. PSKS, Inc.*, 551 U.S. 877 (2007).

<sup>26</sup> *Verizon Commc'ns, Inc. v. Law Offices of Curtis V. Trinko, LLP* 540 U.S. 398 (2004).

<sup>27</sup> 475 U.S. 574 (1986).

<sup>28</sup> See Eugene Crew, Matsushita v. Zenith: *The Chicago School Teaches the Supreme Court a Dubious Lesson*, ANTITRUST, Fall 1986, at 11; James L. Warren & Mary B. Cranston, *Summary Judgment After Matsushita*, ANTITRUST, Summer 1987, at 12.

<sup>29</sup> *Poller v. CBS*, 368 U.S. 464, 473 (1962).

<sup>30</sup> 550 U.S. 544 (2007).

<sup>31</sup> *Id.* at 546.

<sup>32</sup> *Id.* at 563.

<sup>33</sup> *Id.* at 545.

<sup>34</sup> *Id.* at 547.

<sup>35</sup> *Id.* at 554, 566.

<sup>36</sup> 129 S. Ct. 1937, 1950 (2009).

<sup>37</sup> *William Kolasky & David Olsky, Bell Atlantic Corp. v. Twombly: Laying Conley v. Gibson to Rest*, ANTITRUST, Fall 2007, at 27.

<sup>38</sup> Wrobel et al., *supra* note 15.

<sup>39</sup> 509 U.S. 579 (1993).

<sup>40</sup> *Id.* at 589.

<sup>41</sup> *Id.* at 580.

<sup>42</sup> 526 U.S. 137 (1999).

<sup>43</sup> FED. R. EVID. 702.

<sup>44</sup> See, e.g., Christopher B. Hockett, Geraldine M. Alexis & Christina M. Wheeler, *Revisiting the Admissibility of Expert Testimony in Antitrust Cases*, ANTITRUST, Summer 2001, at 7; Gregory G. Wrobel & Ellen Meriweather, *Economic Experts: The Challenges of Gatekeepers and Complexity*, ANTITRUST, Summer 2011, at 8.

<sup>45</sup> See, e.g., James Langenfeld & Christopher Alexander, *Daubert and Other Gatekeeping Challenges of Antitrust Experts*, ANTITRUST, Summer 2011, at 21; Andrew I. Gavil & Katherine I. Funk, *Daubert Comes to Washington: Managing Expert Economic Testimony in Part III Proceedings at the FTC*, ANTITRUST, Spring 2006, at 21.

<sup>46</sup> 207 F.3d 1039 (8th Cir. 2000).

<sup>47</sup> No. 11-864, 2012 WL 113090 (cert. granted June 25, 2012).



- <sup>48</sup> See, e.g., *Behrend v. Comcast Corp.*, 655 F.3d 182 (3d Cir. 2011); *West v. Prudential Sec., Inc.*, 282 F.3d 935, 938 (7th Cir. 2002); *In re Zurn Pex Plumbing Prods. Liab. Litig.*, 644 F.3d 604 (8th Cir. 2011).
- <sup>49</sup> FED. R. CIV. P. 23(f) advisory committee's note (1998).
- <sup>50</sup> *Id.*
- <sup>51</sup> The most significant procedural change in the 2003 amendments was to give district judges greater flexibility in determining when to decide class certification motions by providing that class certification decisions are to be made at "an early practicable time," rather than "as soon as practicable." This change was designed to encourage judges to authorize "discovery on merits issues, which may be necessary for certification decisions, while postponing discovery pertaining to the probable outcome on the merits until after the certification process." See advisory committee notes. For a discussion of the other 2003 amendments and their implications, see Joshua B. Gray & Michelle H. Seagull, *Class Action Reaction: Amended Rule 23 Enhances Judicial Supervision in Class Litigation*, ANTITRUST, Spring 2004, at 92.
- <sup>52</sup> *Amchem Prods., Inc. v. Windsor*, 521 U.S. 591 (1997).
- <sup>53</sup> *Gen. Tel. Co. of Sw. v. Falcon*, 457 U.S. 147, 161 (1982).
- <sup>54</sup> *Eisen v. Carlisle & Jacquelin*, 417 U.S. 156, 177 (1974).
- <sup>55</sup> For a survey of the case law, see William Kolasky & Kevin Stemp, *Antitrust Class Actions: More Rigor, Fewer Shortcuts*, 30 CLASS ACTION REPS. 1 (Nov.–Dec. 2009).
- <sup>56</sup> *Id.* at 9–10.
- <sup>57</sup> *Id.* The grant of class certification was affirmed in 31 percent of cases, while the denial was affirmed in 83 percent of cases.
- <sup>58</sup> *Id.*
- <sup>59</sup> 249 F.3d 672 (7th Cir. 2001).
- <sup>60</sup> 282 F.3d 935 (7th Cir. 2002).
- <sup>61</sup> *Id.* at 938.
- <sup>62</sup> See Kolasky & Stemp, *supra* note 55. The Class Action Fairness Act of 2005 (CAFA) resulted in shifting many state law class actions, including those filed under state antitrust laws, to federal court. See Gregory G. Wrobel & Michael J. Waters, *Early Returns: Impact of the Class Action Fairness Act on Federal Jurisdiction over State Law Class Actions*, ANTITRUST, Fall 2006, at 45 ("[R]ulings on important forward-looking issues largely have supported and furthered CAFA's expansion of federal diversity jurisdiction.").
- <sup>63</sup> 552 F.3d 305 (3d Cir. 2009).
- <sup>64</sup> *Id.* at 321–22.
- <sup>65</sup> *Id.*
- <sup>66</sup> 131 S. Ct. 2541 (2011).
- <sup>67</sup> *Id.* at 2551.
- <sup>68</sup> *Id.* at 2551–52.
- <sup>69</sup> *Id.* at 2552.
- <sup>70</sup> Scott D. Hammond, *The Evolution of Criminal Antitrust Enforcement over the Last Two Decades* 2 (Feb. 25, 2010), available at <http://www.justice.gov/atr/public/speeches/255515.pdf>.
- <sup>71</sup> *Id.*
- <sup>72</sup> Scott D. Hammond, *Measuring the Value of Second-In Cooperation in Corporate Plea Negotiations* 10 (Mar. 29, 2006), available at <http://www.justice.gov/atr/public/speeches/215514.pdf>.
- <sup>73</sup> Hammond, *supra* note 70, at 4.
- <sup>74</sup> *Id.* at 2–3.
- <sup>75</sup> *Id.*
- <sup>76</sup> Donald W. Hawthorne, *supra* note 14.
- <sup>77</sup> Robert H. Lande & Joshua P. Davis, *Benefits from Private Antitrust Enforcement: An Analysis of Forty Cases*, 42 U.S.F. L. REV. 879 (2008).
- <sup>78</sup> Scott A. Moss, *Litigation Discovery Cannot Be Optimal but Could Be Better: The Economics of Improving Discovery Timing in a Digital Age*, 58 DUKE L.J. 889, 894 (2009).
- <sup>79</sup> See F. Matthew Ralph & Caroline B. Sweeney, *E-Discovery and Antitrust Litigation*, ANTITRUST, Fall 2011, at 91.
- <sup>80</sup> *United States v. Microsoft Corp.*, 87 F. Supp. 2d 30 (D.D.C.), *aff'd in part, rev'd in part, remanded in part*, 253 F.3d 34 (D.C. Cir. 2000) (en banc).
- <sup>81</sup> Plaintiffs' Memorandum of Law in Support of Final Approval of the Proposed Settlement and in Response to Objections at 1, 4, 6, 17–18; *In re Insurance Brokerage Antitrust Litig.*, No. 04-5184 (D.N.J. Oct. 22, 2004), ECF No. 1901.
- <sup>82</sup> Joyce E. Cutler, *Costs of E-Mail Restoration Escalate in AMD's Antitrust Case Against Intel*, 7 DIGITAL DISCOVERY & E-EVIDENCE REP. 200 (2007).
- <sup>83</sup> Moss, *supra* note 78, at 892.
- <sup>84</sup> George J. Socha, *2008 Socha-Gelbman 6th Annual Electronic Discovery Report*, SOCHA CONSULTING.COM, available at <http://sochaconsulting.com/2008survey/results.php> (last visited Oct. 11, 2012).
- <sup>85</sup> See, e.g., *Monique Da Silva Moore v. Publicis Group & MSL Group*, No. 11-cv-1279 (S.D.N.Y. Feb. 24, 2012) (No. 96) (court accepting predictive coding where parties agreed to specific review protocol and accuracy levels). The antitrust agencies have also indicated that they are open to discuss the use of predictive coding in certain cases as well. THE THRESHOLD (ABA Section of Antitrust Law Mergers and Acquisitions Comm. Newsl.), vol. 12, no. 3, Summer 2012, at 105–07.
- <sup>86</sup> *Am. Safety Equip. Corp. v. J.P. Maguire & Co.*, 391 F.2d 821, 827 (2d Cir. 1968).
- <sup>87</sup> *Id.* at 629.
- <sup>88</sup> *Shearson/Am. Express, Inc. v. McMahon*, 482 U.S. 220, 232 (1987).
- <sup>89</sup> See, e.g., *Kristian v. Comcast Corp.*, 446 F.3d 25 (1st Cir. 2006); *Baxter Int'l v. Abbott Labs*, 315 F.3d 829 (7th Cir. 2003). *But see Denny v. BDO Seidman*, 412 F.3d 58 (2d Cir. 2005) (defendants could not compel arbitration where conduct at issue was not sufficiently intertwined with subject of arbitration agreement); *AlliedSignal, Inc. v. B.F. Goodrich Co.*, 183 F.3d 568 (7th Cir. 1999) (claims regarding a strategic alliance arrangement, originating from a contract with an arbitration clause, were not arbitrable just because the arrangement had its "origin or genesis" in the contract); *Jung v. Ass'n of Am. Med. Colleges*, 300 F. Supp. 2d 119 (D.D.C. 2004) (declining to sever single claim that was subject to an arbitration clause from other claims because doing so would "improperly compartmentaliz[e] plaintiffs' single conspiracy claim").
- <sup>90</sup> *JLM Indus. v. Stolt-Nielsen, S.A.*, 387 F.3d 163 (2d Cir. 2004).
- <sup>91</sup> 130 S. Ct. 1758, 1763 (2009) ("[A] party may not be compelled under the FAA to submit to class arbitration unless there is a contractual basis for concluding the party agreed to do so.").
- <sup>92</sup> *AT&T Mobility v. Concepcion*, 131 S. Ct. 1740 (2011).
- <sup>93</sup> *In re Am. Express Merchants Litig.*, 634 F.3d 187 (2d Cir. 2011). The Second Circuit first heard the case in 2009 and held that the class action waiver was unenforceable. 554 F.3d 300 (2d Cir. 2009). The Supreme Court remanded the case for reconsideration in light of its *Stolt-Nielsen* decision, but on remand the Second Circuit held that the *Stolt-Nielsen* analysis did not impact its analysis.
- <sup>94</sup> See Ellen Meriwether, *Class Action Waiver and the Effective Vindication Doctrine at the Antitrust/Arbitration Crossroads*, ANTITRUST, Summer 2012, at 67.
- <sup>95</sup> David L. Meyer, Deputy Assistant Att'y Gen. Antitrust Div., U.S. Dep't Justice, *Speech, We Should Not Let the Ongoing Rationalization of Antitrust Lead to the Marginalization of Antitrust* (Oct. 31, 2007), available at <http://www.justice.gov/atr/public/speeches/227399.htm>.